Supreme Court, U.S.
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No. 97-1943

In The

Supreme Court of the United States

October Term, 1998

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

JOINT APPENDIX

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Petition For Writ Filed June 3, 1998
Certiorari Granted January 8, 1999

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RELEVANT DOCKET ENTRIES

1/19/96	Complaint filed by Plaintiffs Karen Sutton and Kimberly Hinton
	* * *
2/29/96	Motion to Dismiss with Prejudice filed by Defendant United Air Lines, Inc.
2/29/96	Memorandum Brief by Defendant United Air Lines, Inc. in Support of Motion to Dismiss Action with Prejudice
	* * *
4/8/96	Brief by Plaintiffs Karen Sutton and Kimberly Hinton in Opposition to United Air Lines' Motion to Dismiss Action with Prejudice
	* * *
5/1/96	Reply by Defendant United Air Lines, Inc. in Support of Motion to Dismiss Action with Prejudice
	* * *
7/11/96	Notice by Plaintiffs Karen Sutton and Kimberly Hinton of Amended Complaint
7/11/96	Amended Complaint
	* * *
8/28/96	Memorandum Opinion and Order by Judge Daniel B. Sparr Granting United Air Lines' Motion to Dismiss Action with Prejudice
	* * *
9/27/96	Notice of Appeal
	* * *
11/26/97	Opinion filed by the Court of Appeals

12/18/97 Mandate from the Court of Appeals; Judgment dated 11/26/97 affirming the decision of the District Court on appeal

6/3/98 Petition for Writ of Certiorari filed

6/9/98 Notification from Court of Appeals regarding Petition for Writ of Certiorari filed in the United States Supreme Court on 6/3/98

1/8/99 Petition for Writ of Certiorari granted

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

vs.

UNITED AIRLINES, INC.,

Defendant.

COMPLAINT

(Filed Jan. 19, 1996)

Plaintiffs Kimberly Hinton and Karen Sutton allege as follows:

1. This is an action under the Americans with Disabilities Act by identical twin sisters, both experienced commercial pilots. The Plaintiffs desire to break down an illegal barrier that thwarts the realization of their life long goal to fly for a major air carrier. Each Plaintiff has painstakingly prepared for the job she seeks, and each possesses FAA medical approval to fly any class of passenger airplane. But, because of their uncorrected vision – which is 20-20 or better with corrective lenses – their applications were summarily rejected by the Defendant, United Airlines, Inc. ("Defendant" or "United").

PRELIMINARY ALLEGATIONS

2. Plaintiff Kimberly Hinton is an individual with a residence address of 6324 North Walnut Street, Spokane, Washington.

3. On or about December 3, 1992, Ms. Hinton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

4. Ms. Hinton has received a right to sue letter from the EEOC.

5. Plaintiff Karen Sutton is an individual with a residence address of 2903 North Regal, Spokane, Washington.

6. On or about December 16, 1992, Ms. Sutton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

7. Ms. Sutton has received a right to sue letter from the EEOC.

8. Defendant is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant also maintains a pilot training and hiring center in Denver, Colorado, known as the Denver Flight Center.

9. Defendant is an employer under relevant statutory law and employs more than 500 people.

10. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1331.

11. Venue is proper in this court pursuant to F.R.C.P. 98.

GENERAL ALLEGATIONS

12. Plaintiffs incorporate Paragraphs 1 through 11.

13. Ms. Hinton and Ms. Sutton are regional airline pilots. Ms. Sutton flies for Skywest Airlines and Ms. Hinton flies for CC Air, Inc., doing business as US Air Express.

14. Both Ms. Sutton and Ms. Hinton have a career objective to fly for a major airline. They have thoroughly prepared to accomplish that goal, gaining credentials and experience that far surpasses United's hiring standards.

15. United's Flight Officer Employment Application sets forth its required basic qualifications, including

A. Minimum age of 21

B. High school graduate

C. 350 hours of flight experience in fixed wing craft as pilot or co-pilot

D. FAA commercial pilot certificate with instrument rating

E. Second Class FAA medical certificate, with the ability to obtain first class certification

16. By way of comparison, in 1992 when Ms. Sutton and Ms. Hinton applied, each was 30 years of age. Each held a bachelor's degree with honors and Ms. Hinton also had an associate degree in Professional Flight. Each Plaintiff possessed (and still does) an airline transport pilot

license, which is more exacting and supersedes a commercial license. Ms. Sutton had over 1,700 flight hours as Pilot in Command, and over 3,400 total hours. Ms. Hinton had over 3,500 hours as Pilot in Command and over 4,700 total hours. Each possessed (and still does) a First-Class medical certificate from the Federal Aviation Administration, which indicates fitness to fly in any capacity, including that of airline captain.

17. The experience and qualifications of each Plaintiff have only increased since then.

Ms. Hinton's Application

18. In the years before the Americans with Disabilities Act took effect, Ms. Hinton twice applied for a pilot position with United. She applied once before the Act's passage, and again after it was enacted but before it took effect. Each time, her application was rejected because her uncorrected vision did not meet United's minimum standard. The rejections were painful and discouraging for someone who had worked so long and hard to become a pilot.

19. In October of 1992, after the ADA took effect, Ms. Hinton applied again. Soon after, she received a letter from United inviting her to travel to Denver to participate in flight simulator testing and interviews.

20. Ms. Hinton was elated. When she called the Flight Training Center to schedule the testing and interview, she commented to the United representative how pleased she was to have an interview in spite of United's

past policy concerning corrected vision. The representative wished her luck.

21. Preparing for the interview involved major effort, including gathering the personal documentation required by United and conducting training sessions and mock interviews with aviation consultants.

22. On the appointed day, Ms. Hinton performed the simulator test and was told by the evaluator: "congratulations, you did a very good job."

23. However, during her personal interview, a United screener asked Ms. Hinton if she was aware that her uncorrected vision did not comply with United's minimum requirements. The screener informed the United interviewer, who called Ms. Hinton away from her group of applicants and told her the company had made a "terrible, terrible mistake." He terminated the interview and dismissed her in front of the startled group.

24. United had learned of Ms. Hinton's uncorrected vision level simply by reading the United Application which she had submitted prior to being invited to interview. She had fully responded to the items requesting information on visual acuity.

25. United sent Ms. Hinton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

Ms. Sutton's Application

26. Ms. Sutton also had the dream of flying for a major airline. She watched the progress of her sister's

applications and shared in the disappointment of the first two rejections. Clearly, applying was futile.

27. The enactment of the Americans With Disabilities Act gave her hope that she could apply and be judged on her merits.

28. In November of 1992, after the ADA took effect, Ms. Sutton submitted an application for employment as a pilot. Soon after, she received a letter from United inviting her to travel to Denver to participate in interviews and flight simulator testing.

29. Ms. Sutton's invitation was thrilling, but as with Ms. Hinton and other serious applicants, also signalled the continuation of hard work to prepare for the interview.

30. Ms. Sutton's preparation – covering the period before and after the invitation – included approximately eight months of intensive study and review, passing a Flight Engineer written exam, training with an aviation consultant, and review of virtually every aviation situation and aircraft in her experience, all of which she managed to accomplish while working full time.

31. The last few weeks before the interview were particularly draining because Ms. Sutton learned that United had again disqualified her sister due to her vision. However, she decided to continue preparing unless notified otherwise by United.

32. The same harsh conclusion awaited. During Ms. Sutton's personal interview, (which in her case was randomly scheduled before the simulator test) United personnel asked Ms. Sutton if she was aware that her

uncorrected vision did not comply with United's minimum requirements. They told her that her invitation to interview was a mistake, and dismissed her.

33. United had learned of Ms. Sutton's uncorrected vision level simply by reading the application which she had previously submitted. She had fully responded to the application's questions about visual acuity and United invited her to interview even while it knew that she did not meet the requirement for uncorrected vision.

34. United sent Ms. Sutton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

ADA Violations

35. Plaintiffs are qualified for the positions for which they applied.

36. With the use of corrective lenses, each Plaintiff has vision that is 20/20 or better.

37. However, without corrective lenses or other "mitigating measures . . . or assistive or prosthetic devices," Ms. Sutton and Ms. Hinton are substantially limited in the major life activity of seeing.

38. With or without reasonable accommodation, Plaintiffs are able to perform the essential functions of the job for which they applied.

39. United rejected Plaintiffs on the basis of their disability, or because United regarded Plaintiffs as having a disability.

40. The EEOC has issued a Determination of Probable Violation of the Americans with Disabilities Act in the case of each Plaintiff.

41. The EEOC identified the following violations by United:

A. Requesting disability-related information in a job application;

B. Discriminating against a qualified individual on the basis of disability;

C. Failing to maintain separate files concerning disability related information;

D. Failing to keep required records when an applicant is rejected for not meeting the employer's qualifications.

42. On information and belief, United did not enter into meaningful conciliation efforts with the EEOC.

43. United Airline's refusal to hire Plaintiffs has caused them, and will continue to cause them, damages in an amount to be proven at trial.

CLAIM FOR RELIEF
(American with Disabilities Act)

44. Plaintiffs incorporate Paragraphs 1 through 43.

45. United's violations of the ADA, including its unlawful refusal to hire Plaintiffs, has caused them, and will continue to cause them, damages in an amount to be proven at trial, including back pay, front pay, and the economic value of lost hours of flight experience.

46. United has acted willfully and wantonly, or with reckless disregard for Plaintiffs' rights, entitling them to an award of punitive damages.

47. Pursuant to statute, Plaintiffs are entitled to injunctive relief, including an order forbidding United from applying unlawful criteria in future hiring and ordering United to instate plaintiffs in the positions they rightfully should hold and which reflect Plaintiffs' lost seniority and flight hours.

48. Pursuant to statute, if judgment enters in Plaintiffs' favor, Plaintiffs are entitled to an award of attorneys fees and costs.

WHEREFORE, Plaintiffs pray that the court find in their favor and against Defendant United Airlines, Inc., and that the court:

A. Enter judgment in favor of Plaintiffs and against Defendant for compensatory damages, including front pay, back pay, and the economic value of Plaintiffs' lost hours of flight experience;

B. Enter a permanent injunction enjoining Defendant from applying unlawful criteria in future hiring and ordering Defendant to instate Plaintiffs in the positions they rightfully should hold, including credit for Plaintiffs' lost seniority and flight hours, which order shall be binding upon Defendant, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert with Defendant who receive actual notice of the order;

C. Enter judgment in favor of Plaintiffs and against Defendant for punitive damages;

D. Enter an order granting Plaintiffs their attorneys fees and costs; and

E. Grant such further relief as the court deems just and proper.

Respectfully submitted this 19th day of January, 1996.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues raised herein.

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
Tucker K. Trautman
Shawn D. Mitchell

By: /s/ Shawn D. Mitchell
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Plaintiffs' addresses:

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Karen Sutton
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Spokane, Washington 99207

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

v.

UNITED AIR LINES, INC.,

Defendant.

MOTION TO DISMISS PURSUANT TO
FED. R. CIV. PROC. 12(B)(6)

(Filed Feb. 29, 1996)

Defendant United Air Lines, Inc. ("United"), by and through its counsel Brownstein Hyatt Farber & Strickland P.C., hereby moves this Court for an order dismissing this action with prejudice pursuant to Fed. R. Civ. Proc. 12(b)(6) on the ground that plaintiffs have failed to state a claim upon which relief can be granted. In support of this motion, United submits its Memorandum Brief, filed simultaneously herewith.

DATED this 29th day of February, 1996.

BROWNSTEIN HYATT FARBER & STRICKLAND, P.C.

By: /s/ Lisa Hogan
Lisa Hogan
410 17th Street, 22nd Floor
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ATTORNEYS FOR UNITED AIR LINES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

vs.

UNITED AIRLINES, INC.,

Defendant.

NOTICE OF AMENDED COMPLAINT

(Filed Jul. 11, 1996)

Pursuant to Fed. R. Civ. P. 15(a), Plaintiffs Karen Sutton and Kimberly Hinton file this Amended Complaint. In conjunction therewith, Plaintiffs state as follows:

1. In this action, Plaintiffs seek relief under the Americans With Disabilities Act because of Defendant's discriminatory policy. Defendant rejected Plaintiffs' applications for pilot positions on the basis of their disability.

2. As alleged in Plaintiffs' Complaint, Plaintiffs are extremely well qualified for the pilot positions that they seek. Plaintiffs have a disability, or Defendant regards them as having a disability, because each Plaintiff has uncorrected vision of 20/200 or worse in one eye and 20/400 or worse in the other. Defendant rejected Plaintiffs' applications based on their disability.

3. Defendant has filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6), contending that Plaintiffs do not have a covered disability and that Defendant does not regard Plaintiffs as having a disability.

4. While the original Complaint adequately states a claim for relief, Plaintiffs have identified certain areas where clarification would be helpful to highlight the existence and extent of their impairment, as well as conduct by Defendant which demonstrates that it regards Plaintiffs as disabled. Plaintiffs have therefore prepared and filed the Amended Complaint.

Respectfully submitted this 11th day of July, 1996.

IRELAND, STAPLETON, PRYOR &
PASCOE, P.C.
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Shawn D. Mitchell

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Telephone: (303) 623-2700

CERTIFICATE OF MAILING

I hereby certify that on July 11, 1996, a true and correct copy of the foregoing **NOTICE OF AMENDED COMPLAINT** was deposited in the United States Mail, postage prepaid, and addressed to the following:

Lisa Hogan, Esq.
Brownstein Hyatt Farber & Strickland, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202

/s/ Peggy G. Puckett

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

vs.

UNITED AIRLINES, INC.,

Defendant.

AMENDED COMPLAINT

Plaintiffs Kimberly Hinton and Karen Sutton allege as follows:

1. This is an action under the Americans with Disabilities Act by identical twin sisters, both experienced commercial pilots. The Plaintiffs desire to break down an illegal barrier that thwarts the realization of their life long goal to fly for a major air carrier. Each Plaintiff has painstakingly prepared for the job she seeks, and each possesses FAA medical approval to fly any class of passenger airplane. But, because of their uncorrected vision – which is 20/20 or better with corrective lenses – their applications were summarily rejected by the Defendant, United Airlines, Inc. ("Defendant" or "United").

PRELIMINARY ALLEGATIONS

2. Plaintiff Kimberly Hinton is an individual with a residence address of 6324 North Walnut Street, Spokane, Washington.

3. On or about December 3, 1992, Ms. Hinton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

4. Ms. Hinton has received a right to sue letter from the EEOC.

5. Plaintiff Karen Sutton is an individual with a residence address of 2903 North Regal, Spokane, Washington.

6. On or about December 16, 1992, Ms. Sutton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

7. Ms. Sutton has received a right to sue letter from the EEOC.

8. Defendant is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant also maintains a pilot training and hiring center in Denver, Colorado, known as the Denver Flight Center.

9. Defendant is an employer under relevant statutory law and employs more than 500 people.

10. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1331.

11. Venue is proper in this court pursuant to F.R.C.P. 98.

GENERAL ALLEGATIONS

12. Plaintiffs incorporate Paragraphs 1 through 11.

13. Ms. Hinton and Ms. Sutton are regional airline pilots. Ms. Sutton flies for Skywest Airlines and Ms. Hinton flies for CC Air, Inc., doing business as US Air Express.

14. Both Ms. Sutton and Ms. Hinton have a career objective to fly for a major airline. They have thoroughly prepared to accomplish that goal, gaining credentials and experience that far surpasses United's hiring standards.

15. United's Flight Officer Employment Application sets forth its required basic qualifications, including:

A. Minimum age of 21

B. High school graduate

C. 350 hours of flight experience in fixed wing craft as pilot or co-pilot

D. FAA commercial pilot certificate with instrument rating

E. Second Class FAA medical certificate, with the ability to obtain first class certification

16. By way of comparison, in 1992 when Ms. Sutton and Ms. Hinton applied, each was 30 years of age. Each held a bachelor's degree with honors and Ms. Hinton also had an associate degree in Professional Flight. Each Plaintiff possessed (and still does) an airline transport pilot license, which is more exacting and supersedes a commercial license. Ms. Sutton had over 1,700 flight hours as Pilot in Command, and over 3,400 total hours. Ms. Hinton had over 3,500 hours as Pilot in Command and over 4,700

total hours. Each possessed (and still does) a First-Class medical certificate from the Federal Aviation Administration, which indicates fitness to fly in any capacity, including that of airline captain.

17. The experience and qualifications of each Plaintiff have only increased since then.

Ms. Hinton's Application

18. In the years before the Americans with Disabilities Act took effect, Ms. Hinton twice applied for a pilot position with United. She applied once before the Act's passage, and again after it was enacted but before it took effect. Each time, her application was rejected because her uncorrected vision did not meet United's minimum standard. The rejections were painful and discouraging for someone who had worked so long and hard to become a pilot.

19. In October of 1992, after the AIDA took effect, Ms. Hinton applied again. Soon after, she received a letter from United inviting her to travel to Denver to participate in flight simulator testing and interviews.

20. Ms. Hinton was elated. When she called the Flight Training Center to schedule the testing and interview, she commented to the United representative how pleased she was to have an interview in spite of United's past policy concerning corrected vision. The representative wished her luck.

21. Preparing for the interview involved major effort, including gathering the personal documentation

required by United and conducting training sessions and mock interviews with aviation consultants.

22. On the appointed day, Ms. Hinton performed the simulator test and was told by the evaluator: "congratulations, you did a very good job."

23. However, during her personal interview, a United screener asked Ms. Hinton if she was aware that her uncorrected vision did not comply with United's minimum requirements. The screener informed the United interviewer, who called Ms. Hinton away from her group of applicants and told her the company had made a "terrible, terrible mistake." He terminated the interview and dismissed her in front of the startled group.

24. United had learned of Ms. Hinton's uncorrected vision level simply by reading the United Application which she had submitted prior to being invited to interview. She had fully responded to the items requesting information on visual acuity.

25. United sent Ms. Hinton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

Ms. Sutton's Application

26. Ms. Sutton also had the dream of flying for a major airline. She watched the progress of her sister's applications and shared in the disappointment of the first two rejections. Clearly, applying was futile.

27. The enactment of the Americans With Disabilities Act gave her hope that she could apply and be judged on her merits.

28. In November of 1992, after the ADA took effect, Ms. Sutton submitted an application for employment as a pilot. Soon after, she received a letter from United inviting her to travel to Denver to participate in interviews and flight simulator testing.

29. Ms. Sutton's invitation was thrilling, but as with Ms. Hinton and other serious applicants, also signalled the continuation of hard work to prepare for the interview.

30. Ms. Sutton's preparation – covering the period before and after the invitation – included approximately eight months of intensive study and review, passing a Flight Engineer written exam, training with an aviation consultant, and review of virtually every aviation situation and aircraft in her experience, all of which she managed to accomplish while working full time.

31. The last few weeks before the interview were particularly draining because Ms. Sutton learned that United had again disqualified her sister due to her vision. However, she decided to continue preparing unless notified otherwise by United.

32. The same harsh conclusion awaited. During Ms. Sutton's personal interview, (which in her case was randomly scheduled before the simulator test) United personnel asked Ms. Sutton if she was aware that her

uncorrected vision did not comply with United's minimum requirements. They told her that her invitation to interview was a mistake, and dismissed her.

33. United had learned of Ms. Sutton's uncorrected vision level simply by reading the application which she had previously submitted. She had fully responded to the application's questions about visual acuity and United invited her to interview even while it knew that she did not meet the requirement for uncorrected vision.

34. United sent Ms. Sutton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

ADA Violations

35. Plaintiffs are qualified for the positions for which they applied.

36. With the use of corrective lenses, each Plaintiff has vision that is 20/20 or better.

37. However, without corrective lenses or other "mitigating measures . . . or assistive or prosthetic devices," Ms. Sutton and Ms. Hinton are substantially limited in the major life activity of seeing, as more fully described below:

a. Each Plaintiff has uncorrected vision of 20/200 or worse in her right eye and 20/400 or worse in her left eye.

b. A person with visual acuity of 20/200 can see an object from 20 feet only as well as an unimpaired person can see the same object from 200 feet. If the visual acuity is 20/400, then the

impaired individual standing 20 feet away sees the same image as the unimpaired individual does from 400 feet.

c. Corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification and also under the law of numerous states. Thus, Plaintiffs' uncorrected vision – their level of vision without regard to mitigating measures or corrective or assistive devices is equal to or lower than a level regarded as blind in numerous jurisdictions.

d. The impairment of each Plaintiff is substantial in that it is permanent; it results in constant reliance on mitigating measures or assistive devices; and without such measures, each Plaintiff effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores.

e. With corrective measures, however, Plaintiffs function identically to individuals without a similar impairment.

38. United regards Plaintiffs as having a substantially limiting impairment, as reflected in the following items:

a. United asserts that its requirement for uncorrected vision is a "rational, job-related, safety requirement." United thus believes that Plaintiffs' physical condition limits their ability to perform the type of work at issue here.

b. In actuality, the requirement has no demonstrable relationship to safety. The Federal Aviation Administration has determined, based on historical records and statistics, and based on

individual examination of each Plaintiff, that there is no safety concern regarding the physical capacity of each Plaintiff to perform the job they applied for.

c. To award a first class medical certificate, the FAA until recently applied individual scrutiny to applicants with uncorrected vision below 20/100. They were required to obtain a "Statement of Demonstrated Ability" and waiver of the uncorrected vision standard to qualify. However, the agency recently dropped the requirement because records and statistics over several decades show no difference of safety or performance between pilots with uncorrected vision better than 20/100 and pilots that received the waiver.

d. On information and belief, United has absolutely no data or evidence indicating that Plaintiffs' visual acuity and use of corrective lenses present safety concerns or have any effect on Plaintiffs' ability to perform the type of work at issue here. Instead, United's position is based on stereotype, myth, or unsubstantiated fears.

e. On information and belief, United's policy originally was modeled on military requirements for pilot training, without independent supporting basis. Over the years, United has relaxed its minimum standard from 20/20 to 20/70 and most recently to 20/100. On information and belief, each modification was without supporting medical evidence and was motivated primarily by market forces and competition for qualified pilot candidates.

f. United's policy blocks Plaintiffs from an entire class of employment: global airline pilot. United's policy is not limited to certain models

of aircraft, certain air routes, or certain flight conditions. It is a blanket prohibition without any supporting data or individualized consideration of either Plaintiff.

g. United's rejection of Plaintiffs is not based on an isolated mismatch between one employer and these applicants. There is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines. Nor is it related solely to one job with this employer. Rather, it blocks thousands of opportunities throughout the world.

h. At the time of Plaintiffs' applications and at present, other global carriers had similar or higher minimum standards, thus blocking Plaintiffs from seeking the same class of employment elsewhere in the industry.

39. United thus treats Plaintiffs' impairment as substantially limiting, whether it in fact is or not. And the attitude and policy of United toward Plaintiffs' condition is substantially limiting to Plaintiffs, whether their impairment in fact is or not.

40. With or without reasonable accommodation, Plaintiffs are able to perform the essential functions of the job for which they applied.

41. United rejected Plaintiffs on the basis of their disability, or because United regarded Plaintiffs as having a disability.

42. The EEOC has issued a Determination of Probable Violation of the Americans with Disabilities Act in the case of each Plaintiff.

43. The EEOC identified the following violations by United:

a. Requesting disability-related information in a job application;

b. Discriminating against a qualified individual on the basis of disability;

c. Failing to maintain separate files concerning disability related information;

d. Failing to keep required records when an applicant is rejected for not meeting the employer's qualifications.

44. On information and belief, United did not enter into meaningful conciliation efforts with the EEOC.

45. United Airline's refusal to hire Plaintiffs has caused them, and will continue to cause them, damages in an amount to be proven at trial.

CLAIM FOR RELIEF
(American with Disabilities Act)

46. Plaintiffs incorporate Paragraphs 1 through 45.

47. United's violations of the ADA, including its unlawful refusal to hire Plaintiffs, has caused them, and will continue to cause them, damages in an amount to be proven at trial, including back pay, front pay, and the economic value of lost hours of flight experience.

48. United has acted willfully and wantonly, or with reckless disregard for Plaintiffs' rights, entitling them to an award of punitive damages.

49. Pursuant to statute, Plaintiffs are entitled to injunctive relief, including an order forbidding United from applying unlawful criteria in future hiring and ordering United to instate plaintiffs in the positions they rightfully should hold and which reflect Plaintiffs' lost seniority and flight hours.

50. Pursuant to statute, if judgment enters in Plaintiffs' favor, Plaintiffs are entitled to an award of attorneys fees and costs.

WHEREFORE, Plaintiffs pray that the court find in their favor and against Defendant United Airlines, Inc., and that the court:

A. Enter judgment in favor of Plaintiffs and against Defendant for compensatory damages, including front pay, back pay, and the economic value of Plaintiffs' lost hours of flight experience;

B. Enter a permanent injunction enjoining Defendant from applying unlawful criteria in future hiring and ordering Defendant to instate Plaintiffs in the positions they rightfully should hold, including credit for Plaintiffs' lost seniority and flight hours, which order shall be binding upon Defendant, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert with Defendant who receive actual notice of the order;

C. Enter judgment in favor of Plaintiffs and against Defendant for punitive damages;

D. Enter an order granting Plaintiffs their attorneys fees and costs; and

E. Grant such further relief as the court deems just and proper.

Respectfully submitted this 11th day of July, 1996.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues raised herein.

IRELAND, STAPLETON, PRYOR
& PASCOE, P.C.
Tucker K. Trautman
Shawn D. Mitchell

By: _____
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Plaintiffs' addresses:

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Karen Sutton
2903 North Regal Street
Spokane, Washington 99207

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,
Plaintiffs,

v.

UNITED AIRLINES, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Aug. 28, 1996)

THIS MATTER comes before the court on the Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (filed February 29, 1996). The court has reviewed the motion, the Plaintiffs' opposition (filed April 8, 1996), the Defendant's reply (filed May 1, 1996), the Amended Complaint (filed July 18, 1996), and the applicable law and is fully advised in the premises.

1. Standard of Review

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a district court's role is to assess the legal feasibility of the complaint; it is not to weigh the evidence which might be offered at trial. In considering the legal feasibility of the complaint, a court may only consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters of which judicial notice may be taken. *Samuels v.*

Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993). Applying Fed. R. Civ. P. 12(b)(6), a court should not dismiss a cause of action for failure to state a claim unless the court determines that the plaintiff can prove no set of facts that would entitle it to relief, even when all well-pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528-29 (10th Cir. 1992); *Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n.*, 908 F.2d 578, 582 (10th Cir. 1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1148 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). So long as the plaintiff can offer evidence in support of a legally recognized claim for relief, a motion to dismiss must be denied. *Hiatt v. Schreiber*, 599 F.Supp. 1142, 1145 (D. Colo. 1984).

2. The Plaintiffs' Claim

The Plaintiffs' Amended Complaint alleges a single claim for violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, ("the ADA"). Plaintiffs are twin sisters who are currently employed as commercial airline pilots. Plaintiffs have applied to Defendant United for employment as passenger airline pilots, but have been rejected for such employment because they do not meet United's minimum uncorrected vision requirements. United requires its passenger airline pilots to have uncorrected vision of 20/100 or better. Each Plaintiff has uncorrected vision of 20/200 or worse in her right eye and

20/400 or worse in her left eye.[1] Plaintiffs claim that they are qualified for the positions for which they applied because, with corrective lenses, they have vision that is 20/20 or better. Plaintiffs allege United is violating the ADA by rejecting them on the basis of a disability or because United regards them as having a disability.

3. Statutory Framework

The ADA forbids discrimination:

> against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1996). In order to state a claim under the ADA, a plaintiff must establish:

> (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and

[1] A person with visual acuity of 20/200 can see an object from 20 feet only as well as an unimpaired person can see the same object from 200 feet. If the visual acuity is 20/400, then the impaired individual standing 20 feet away sees the same image as the unimpaired person sees from 400 feet. Corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification. (Amended Complaint paragraphs 37. b. and c.)

> (3) that the employer terminated him because of his disability.

Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995), quoting *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).[2]

The court must begin by determining whether Plaintiffs are disabled as defined by the ADA. The ADA defines "disability" using three alternatives:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1996). *See also Bolton*, 36 F.3d at 942. Plaintiffs argue that they are disabled and additionally that United regarded them as being disabled. United argues that the Plaintiffs are not disabled because they have no impairment which substantially limits any major life activities. Plaintiffs claim they are, and United regards them as being, substantially limited in the major

[2] The language adopted in the ADA tracks that of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The ADA expressly requires its provisions to be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the two statutes. 42 U.S.C. § 12117(b). Congress intended relevant caselaw developed under the Rehabilitation Act to be generally applicable to analogous inquiries under the ADA. *White*, 45 F.3d at 360; *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 942-43 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1104 (1995); House Report No. 101-485(I) p. 50, *reprinted in* 1990 U.S.C.C.A.N. 332.

life activity of seeing (Amended Complaint paragraphs 37, 38; Plaintiffs' opposition brief pp. 2, 3, 6 n. 2, 12).

Although the ADA does not define "physical impairment," "substantially limits," "major life activities," or "being regarded as having such an impairment," the regulations promulgated by the Equal Employment Opportunity Commission (EEOC) pursuant to the ADA provide significant guidance. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 (5th Cir. 1996) (citation omitted). The regulations define "physical impairment" to include:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; . . .

29 C.F.R. § 1630.2(h)(1) (1996).

> "Major life activities" means:
>
> functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i). The appendix to the regulations provides that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(i) (1996).

> The term "substantially limited" means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Whether an individual is substantially limited in a major life activity is determined in light of:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

"Being regarded as having such an impairment means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward impairment; or

> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having substantially limiting impairment.

29 C.F.R. § 1630.2(l).

4. Analysis

The issue is whether the Plaintiffs' impairment substantially limits any of their major life activities or whether United regards the Plaintiffs as having such an impairment, such that they are disabled as defined by the ADA. The court must consider the extent to which their impairment restricts their specific activities. EEOC Compliance Manual § 902.4(a) (1995). Obviously, the Plaintiffs' ability to see without correction is affected, but, as reflected in the statute and regulations, far more is required to trigger coverage under 42 U.S.C. § 12102(2)(A) and (C).

First, Plaintiffs do not claim any restrictions on their activities other than their inability to obtain employment as passenger airline pilots for United. Plaintiffs do not allege that they have any medical restrictions. Plaintiffs do not allege any activity that they are unable to perform that the average person in the general population can perform, nor do they state that they suffer from any significant restrictions in any activities as compared to the average person. *See* 29 C.F.R. § 1630.2(l)(i) and (ii). Indeed, they are currently employed as commercial airline pilots. Plaintiffs concede that, with their corrective lenses, they are able to function identically to individuals

without a similar impairment. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors in 29 C.F.R. § 1630.2(j)(2), does not amount to a significant restriction when compared with the abilities of the average person. 29 C.F.R. Pt. 1630 App. § 1630.2(j).

Second, numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities. *Roth v. Lutheran Gen'l Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir. 1995) (doctor with strabismus (crossed eyes) was not disabled because he could read, write, lecture, and successfully complete graduate school); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.), *reh'g denied*, 9 F.3d 105 (1993), *cert. denied*, 114 S.Ct. 1386 (1994) (vision correctable to 20/200 is not a "handicap" under the Rehabilitation Act); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248-50 (6th Cir. 1985) (plaintiff with crossed eyes who had difficulty operating mail-sorting machine but who otherwise was not limited in work or recreation was not "handicapped" under the Rehabilitation Act); *Venclauskas v. Connecticut Dept. of Pub. Safety*, 921 F.Supp. 78, 80-82 (D.Conn. 1995) (applicant for state police trooper trainee who was rejected for failure to meet unaided visual acuity standard failed to state a claim under the ADA or the Rehabilitation Act); *Joyce v. Suffolk County*, 911 F.Supp. 92, 96 (E.D. New York 1996) (candidate for county police officer position who failed to meet visual acuity standard because his uncorrected vision in each eye was 20/200 but his corrected vision in each eye was 20/20 was not "handicapped" or "disabled" under the ADA or the Rehabilitation Act); *Walker v. Aberdeen-Monroe County*

Hosp., 838 F.Supp. 285, 288 (N.D. Miss. 1993) (a person whose vision is corrected to 20/30 is not "handicapped" within the meaning of the Rehabilitation Act); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, 5 A.D. Cases 853 (S.D.N.Y. April 26, 1996) (plaintiff's diminished vision in one eye did not qualify as a "disability" because it did not substantially limit his ability to participate in any major life activity). Even accepting all of the Plaintiffs' allegations as true, Plaintiffs have not stated a claim that they are substantially limited in the major life activity of seeing.

Third, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working. EEOC Compliance Manual § 902.4(c). With respect to the major life activity of working, the term "substantially limits" means:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. *The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.*

29 C.F.R. § 1630.2(j)(3) (1996) (emphasis added). The major life activity of working does not necessarily mean

working at the job of one's choice. *Bolton*, 36 F.3d at 942, citing *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992); *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088, 1099 (D.Hawaii 1980). In addition to the factors listed in 29 C.F.R. § 1630.2(j)(2), the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working:"

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii) (1996).

The Plaintiffs' entire complaint is based on their inability to obtain the single, particular job of passenger airline pilot with United. Plaintiffs are currently employed as commercial airline pilots, jobs that utilize training, knowledge, skills, and abilities similar to the job of passenger airline pilot. Under the statutory factors to be considered by the court, it is clear that the Plaintiffs cannot state a claim that they are substantially limited in

the major life activity of working. The Plaintiffs' common moderate vision impairment, although certainly an undesirable inconvenience, does not substantially limit their ability to work within the meaning of the ADA.

Plaintiffs argue that the ADA regulations require that the existence of a disability be determined without regard to the effects of mitigating measures such as drugs or prosthesis, citing 29 C.F.R. Pt. 1630, App. § 1630.2(h). The court recognizes that App. § 1630.2(j) provides that "[the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630, App. § 1630.2(j); EEOC Compliance Manual § 902.4(c)(1). However, the part of the EEOC's interpretation of the regulations that Plaintiffs rely upon addresses impairment, not disability, stating that the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. Even if the Plaintiffs' uncorrected vision would be considered an impairment, a physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA because the statute requires an impairment that substantially limits one or more of the major life activities. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). If the impairment does not significantly restrict a major life activity, then the impairment is not a disability. EEOC Compliance Manual § 902.4(c)(1).

Fourth, it is apparent that the ADA was intended to protect only a limited class of persons; specifically, individuals who suffer from impairments significantly more severe than those encountered by the average person in

everyday life, not people who suffer from slight shortcomings that are both minor and widely shared. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986); *Buko v. American Medical Laboratories, Inc.*, 830 F.Supp. 899, 904 (E.D.Va. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994). An excerpt from the legislative history of the ADA reveals that the type of visual impairment contemplated by the legislation is of a degree beyond that correctable by eyeglasses or contact lenses:

> For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [sic] visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

House Report No. 101-485(II) p. 64, *reprinted in* 1990 U.S.C.C.A.N. 346. To adopt a definition of "disabled" that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. Millions of Americans suffer visual impairments no less serious than those of the Plaintiffs. Under such an expansive reading, the term "disabled" would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect.

Fifth, Plaintiffs cannot state a claim that United "regarded" them as being disabled. There is no support for the allegation that United, based on stereotype, myth, or unsubstantiated fears, regarded Plaintiffs as substantially impaired in the major life activity of seeing. As for the major life activity of working, the proper test for a

"regarded as" claim is whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs. *Muller v. Automobile Club of Southern California*, 897 F.Supp. 1289, 1297 (S.D. Calif. 1995) (citation omitted); *Venclauskas*, 1995 WL 819137 at *3-4 (citations omitted). An employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 933-34. An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general. *Hutchinson v. United Parcel Service, Inc.*, 883 F.Supp. 379, 396 (N.D.Iowa 1995). The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 934; EEOC Compliance Manual § 902.8(f).

At most, the Plaintiffs can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position. The Plaintiffs have had no difficulty obtaining other jobs in their field prior to this one. Plaintiffs are currently employed as commercial airline pilots. The need for corrective eyewear in no way substantially limits the Plaintiffs' employment generally. *Joyce*, 911 F.Supp. at 96.

Finally, the Plaintiffs indicate that United's visual acuity standards are based on its "misunderstanding" of

certain government regulations. However, the ADA does not require United to lower or effect substantial modifications of its standards to accommodate disabled persons. *See Southeastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979). Even if the Plaintiffs were disabled within the meaning of the statute, the ADA does not authorize the court to compel the airlines to alter the qualifications for passenger airline pilots.

The court concludes that the Plaintiffs cannot state a claim that United regarded them as impaired in a way that substantially limits a major life activity and, therefore, cannot state a claim that they are disabled under the ADA.

5. Conclusion

Even after accepting all factual allegations as true and drawing all reasonable inferences in favor of the Plaintiffs, the court concludes that the Plaintiffs cannot state a claim under the ADA. Plaintiffs do not support their claim with facts that would prove that they are disabled under the ADA, and therefore, that they are entitled to any relief under the ADA.

Accordingly, IT IS ORDERED:

1. The Defendant's Motion to Dismiss is GRANTED.

2. This civil action is DISMISSED.

3. Upon the filing of a bill of costs with the Clerk of the Court, the Defendant shall be entitled to recover from the Plaintiffs its costs in this action.

DATED at Denver, Colorado, this 28th day of August, 1996.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States
District Judge

Case No. 96-S-121

CERTIFICATE OF MAILING

I hereby certify that a copy of the MEMORANDUM OPINION AND ORDER signed by Judge Daniel B. Sparr and filed on August 28, 1996 was mailed on August 29, 1996 to the following:

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KAREN SUTTON and KIMBERLY HINTON,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 96-1481
UNITED AIR LINES, INC.,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 96-S-121)

(Filed Nov. 26, 1997)

Lisa Hogan (Patrick F. Carrigan and Beth A. Doherty Quinn with her on the brief) of Brownstein, Hyatt, Farber & Strickland, Denver, CO, for appellee.

Shawn D. Mitchell of Ireland, Stapleton, Pryor & Pascoe, Denver, CO, for appellants.

Before **BRORBY, BARRETT, and McKAY** Circuit Judges.

BARRETT, Senior Circuit Judge.

Karen Sutton and Kimberly Hinton (collectively referred to as Plaintiffs) appeal the district court's

dismissal of their Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., discrimination claims for failure to state a claim upon which relief may be granted. *See Sutton v. United Airlines, Inc.*, No. 96-S-121, 1996 WL 588917 (D.Colo. Aug. 28, 1996). For the following reasons, we affirm.

Background

Plaintiffs, who are twin sisters, are currently commercial airline pilots for regional commuter airlines. However, they share a "life long goal to fly for a major air carrier." In 1992, Plaintiffs applied for commercial airline pilot positions with United Air Lines, Inc. (United) and were invited to interview in Denver, Colorado. At their interviews, Plaintiffs were informed that their uncorrected vision disqualified them from pilot positions with United, in that applicants for pilot positions must have uncorrected vision of 20/100 or better in each eye. Plaintiffs' uncorrected vision is 20/200 in the right eye and 20/400 in the left eye.[1] Plaintiffs' corrected vision is 20/20 in both eyes.

Plaintiffs Amended Complaint, filed pursuant to the ADA, alleged that United discriminated against them in the hiring process by rejecting their applications because of their "disability," their uncorrected vision, and/or because United regarded them as disabled. Plaintiffs asserted they are disabled under the ADA because their

[1] A person with visual acuity of 20/200 can see an object from 20 feet only as well as a person with 20/20 vision can see an object at 200 feet.

uncorrected vision substantially limits their major life activity of seeing. They averred their vision limitations are permanent and that without corrective measures, they would "effectively be unable to see" well enough to conduct normal everyday activities such as driving, watching television, or shopping. In addition, Plaintiffs alleged United regarded them as disabled in violation of the ADA because United's policy of requiring uncorrected vision of 20/100 or better blocks Plaintiffs from an entire class of employment, global airline pilots, without any objective evidence of job relatedness or safety.

On August 28, 1996, the district court granted United's motion to dismiss. The court concluded that Plaintiffs' Amended Complaint failed to state a claim under the ADA. The district court ruled that Plaintiffs were not disabled within the meaning of the ADA because their vision did not substantially limit a major life activity. The court stated that with corrective measures Plaintiffs' were "able to function identically to individuals without a similar impairment" and as such Plaintiffs were not substantially limited in the major life activity of seeing. Sutton, 1996 WL 588917, at *3. The court reasoned that "[t]o adopt a definition of 'disabled' that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. Millions of Americans suffer visual impairments no less serious that those of the Plaintiffs. Under such an expansive reading, the term 'disabled' would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect." *Id.* at *5. With respect to Plaintiffs' claim that

United regarded them as disabled in violation of the ADA, the district court found no support for Plaintiffs' allegation that United regarded them as substantially impaired in the major life activity of seeing based on stereotype, myth, or unsubstantiated fears. *Id.* At best, the court reasoned that Plaintiffs established that United regarded them as "unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at *6.

On appeal, Plaintiffs contend the district court erred in dismissing their Amended Complaint for failure to state a claim under the ADA. Plaintiffs assert that they alleged sufficient facts to establish that: (1) they were qualified applicants with a disability because they are substantially limited in the major life activity of seeing, and (2) United regarded them as having a substantially limiting impairment because its policy deprives them of employment throughout the global air carrier industry with no rational job-related basis. Plaintiffs argue that the district court erred in evaluating their physical impairment, their vision, with the benefit of corrective measures, in direct contradiction to the Equal Employment Opportunity Commission's (EEOC) Interpretive Guidance, which provides that the determination of whether an individual has a physical impairment and whether an individual is disabled within the meaning of the ADA must be done without regard to mitigating or corrective measures.

United responds that Plaintiffs' vision does not constitute a "physical or mental impairment" within the meaning of the ADA and that, even if it does, it does not "substantially limit" a major life activity. First, United contends that a minor, relatively common condition, such

as Plaintiffs' nearsightedness and subsequent need for glasses, is not an impairment under the ADA. Second, United asserts that even if Plaintiffs are impaired within the meaning of the ADA, the EEOC's Interpretive Guidance, stating that disability determinations be made without regard to mitigating or corrective measures, is in direct conflict with the ADA's statutory requirement that a disability be a physical or mental impairment that "substantially limit[s] one or more of the major life activities of such individual." *See* 42 U.S.C. § 12101(2). United argues that to evaluate a disability without regard to mitigating measures would read out the ADA's statutory requirement that the impairment be "substantially" limiting. United reasons that if an individual can utilize corrective measures to mitigate the effects of an impairment to a degree such that there is no substantial limitation on a major life activity, then the individual is not disabled within the meaning of the ADA. Finally, United asserts that Plaintiffs can offer no substantive evidence it regarded them as anything other than as unable to meet the rational job-related safety requirements of the jobs they sought.

We review the district court's dismissal of a complaint for failure to state a claim upon which relief may be granted de novo. *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army,* 111 F.3d 1485, 1490 (10th Cir.1997). " 'We uphold a dismissal under Fed.R.Civ.P. 12(b)(6) only when it appears that the plaintiff[s] can prove no set of facts in support of the claims that would entitle [them] to relief, accepting all well-pleaded allegations of the complaint as true and construing them in the

light most favorable to the plaintiff[s].' " *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir.) (*quoting Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir.1996)), *cert. denied*, ___ U.S. ___, 118 S.Ct. 55, ___ L.Ed.2d ___ (1997). With this standard in mind, we turn to Plaintiffs' ADA claims.

Discussion

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[2] 42 U.S.C. § 12112(a). *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir.1994) (*quoting* 42 U.S.C. § 12112(a)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such

[2] In this analysis, we rely on cases interpreting both the ADA and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., because the standards are largely the same. *See Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir.1997) (concluding "cases construing one statute are instructive in construing the other"); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 n. 2 (8th Cir.1995) ("cases interpreting either [ADA or Rehabilitation Act] will be instructive for this analysis" of the ADA); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir.1994) (" 'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.' ") (*quoting* 29 C.F.R. § 1630, App. § 1630.2(g)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995).

individual holds or desires." 42 U.S.C. § 12111(8). *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir.1995) (*quoting* 42 U.S.C. § 12111(8)).

To establish a claim under the ADA, Plaintiffs must demonstrate that: (1) they are disabled persons within the meaning of the ADA; (2) they are qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which they must describe); and (3) United discriminated against them in its employment decision (the job application procedure and/or hiring process) because of their alleged disability. *See Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175 (10th Cir.1997); *White*, 45 F.3d at 360-61.

Taking all Plaintiffs' allegations in their Amended Complaint as true, as we must, Plaintiffs have established they are "qualified" for the position of commercial airline pilot and that United refused to continue their interviews (or hire them) due to their alleged disability, their uncorrected vision. Plaintiffs are both commercial airline pilots with regional commuter airlines; each holds an airline transport pilot license, which supersedes United's requirement for a commercial license; each has recorded thousands of hours of flight time as Pilot in Command; and each has a First-Class medical certificate from the Federal Aviation Administration (FAA). Additionally, United sent each plaintiff a letter confirming that her uncorrected vision, each plaintiff's alleged disability, disqualified her from employment as a United pilot. Thus, at issue in this case, is whether Plaintiffs' vision qualifies them as "individuals with a disability" within the meaning of the ADA.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The statutory requirement that disability determinations be made "with respect to the individual," contemplates an individualized, and case-by-case determination of whether a given impairment substantially limits a major life activity of the individual. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 166 (4th Cir.1997) (*en banc*) (*citing Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir.1995) (collecting cases holding that a finding of disability must be made on a case-by-case basis)). *See also Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir.1996) (holding that "a determination of disability must be made on an individualized, case-by-case basis"); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir.1996) (same); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir.1996) (applying factors in an individualized manner).

Here, Plaintiffs allege they are "disabled" within the meaning of the subparagraphs (A) and (C) because their uncorrected vision is a physical impairment that substantially limits their major life activity of seeing and United regarded them as having a substantially limiting impairment when it disqualified them from all airline pilot positions. We address each of Plaintiffs' contentions in turn.

I. 42 U.S.C. § 12102(2)(A) – Actual Disability

Subparagraph (A) defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual. 42 U.S.C. § 12102(2)(A). Therefore, to qualify as having a "disability" pursuant to subparagraph (A), Plaintiffs must establish (1) that their vision is a "physical or mental impairment;" and (2) if their vision is an impairment, that it "substantially limits one or more of the[ir] major life activities." *See id.*

1. Physical or Mental Impairment

Plaintiffs must establish that their vision is a "physical or mental impairment." *See id.* The ADA does not define a "physical or mental impairment." Hence, we are confronted with a question of statutory interpretation. Our inquiry begins with an examination of the language of the statute itself. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir.1997). " 'When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances.' " *Id.* (*quoting United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir.1991), *cert. denied*, 503 U.S. 984, 112 S.Ct. 1667, 118 L.Ed.2d 388 (1992) (quotation omitted)). In addition, "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138 (1993). "[C]ommon and ordinary usage may be obtained by reference to a dictionary." *United States v. Roberts*, 88 F.3d 872, 877 (10th Cir.1996).

The term "impairment" is not defined by the statute. However, the statute does require that the impairment "substantially limit" a major life activity. *See* 42 U.S.C. § 12102(2)(A). Thus, the impairment must be significant, and not merely trivial. *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1417 (10th Cir.1992). *See also Runnebaum*, 123 F.3d at 167 ("Because the impairment must impose a 'substantial limitation' on 'one or more of the major life activities,' the impairment must be significant, not merely trivial."); *Byrne v. Board of Educ., Sch. of West Allis-West Milwaukee*, 979 F.2d 560, 564 (7th Cir.1992) ("The statute's inclusion of the limiting adjectives 'substantial' and 'major' emphasizes that the impairment must be a significant one."); *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir.1986) (concluding that "[t]he statutory language, requiring a substantial limitation of a major life activity, emphasizes that the impairment must be a significant one"). In addition, Webster's Dictionary defines "impair" as "to make worse by or as if by diminishing in some material respect." Webster's Ninth New Collegiate Dictionary 574 (1984). *See also* Black's Law Dictionary 677 (5th ed. 1981) ("To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."); Ballentine's Law Dictionary 584 (3d ed. 1969) ("To make worse; to diminish in quality, value, excellence, or strength; to deteriorate.").

We are also guided by the definition promulgated by the EEOC in its regulations issued to implement Title 1 of the ADA. *See* 29 C.F.R. § 1630.1(a); 42 U.S.C. § 12116 (requiring the EEOC to issue regulations to implement Title 1 of the ADA). The regulations define a "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h).

To further assist in the interpretation of the ADA, the EEOC published an Interpretive Guidance on Title I of the Americans with Disabilities Act. 29 C.F.R. § 1630, App. Under the EEOC's Interpretative Guidance, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[3] 29 C.F.R. § 1630, App. § 1630.2(h) para. 2.

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[3] It is well established that we must defer to the EEOC's regulatory definition unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, although we give great deference to the EEOC's interpretation of the ADA found in the regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretative guidance promulgated under the Administrative Procedure Act. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir.1994) (no special deference due to Department of Labor comment, which is a "purely interpretive rule") (*citing Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04, 99 S.Ct. 1705, 1717-19, 60 L.Ed.2d 208 (1979) (explaining distinction between

Accordingly, we must determine whether Plaintiffs' vision makes worse or diminishes in a material or significant respect any of the enumerated body systems. *See* 29 C.F.R. § 1630.2(h). We will evaluate Plaintiffs' vision in the uncorrected state, without the benefit of mitigating or corrective measures, because the EEOC's Interpretive Guidance is reasonable and consistent with the statutory mandates themselves. The fact that a disorder or condition may be mitigated or correctable does not affect the underlying nature of the disorder or condition. If the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated body systems of the individual, then it should be considered an "impairment," regardless of whether the individual compensates for this worsening or diminishment by corrective measures. *See Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir.1995) (concluding impairment determination made without regard to mitigating measures).

In addition, "[i]t is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments." 29 C.F.R. § 1630, App. § 1630.2(h) para. 3. Hence, impairment does not include: physical characteristics such as eye color, hair color, left-handedness, height, weight, or muscle tone that are within the "normal" range and are not the result of a

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interpretative rules and substantive or legislative rules)). Hence, while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*.

physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or quick temper where these are not the symptoms of a mental or psychological disorder; or environmental, cultural or economic disadvantages such as poverty, lack of education or a prison record. *Id. See Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir.1997) (holding physical characteristics of excessive weight and lack of cardio-respiratory endurance and strength not impairments under the ADA); *Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir.1989) (holding in Rehabilitation Act case that personality traits of "poor judgment, irresponsible behavior and poor impulse control" could be described as commonplace and "in no way r[ose] to the level of an impairment"); *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (C.D.Cal.1984) (finding body builder's "unique musculoskelital [sic] system and body composition" not an impairment because it is not the result of a "physiological disorder[ ]," "cosmetic disfigurement," or "anatomical loss"); *Trembczsynski v. City of Calumet City*, No. 87-C-0961, 1987 WL 16604 (N.D.Ill. Aug.31, 1987) ("Being slightly myopic [20/40 uncorrected vision] is a physical characteristic, not . . . an 'impairment' as contemplated by the [Rehabilitation] Act."). *Compare Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 23 (1st Cir.1993) (concluding "morbid obesity" may be physical impairment).

Plaintiffs averred that their uncorrected vision prevents them from engaging in normal everyday activities, such as, driving, watching television, and shopping. After careful consideration, we hold that Plaintiffs' averments are sufficient to establish that their uncorrected vision of

20/200, in the right eye, and 20/400, in the left eye, makes worse or diminishes the eyes, the special sense organ of sight, compared to a normal person with 20/20 vision.[4] Therefore, for the purposes of the motion to dismiss, Plaintiffs established their vision is a physical impairment within the meaning of the ADA.

2. "Substantially Limits" A "Major Life Activity"

Plaintiffs must also establish that their physical impairment, their vision, "substantially limits one or more of the[ir] major life activities." *See* 42 U.S.C. § 12102(2)(A). The ADA does not define either "substantially limits" or "major life activity." Therefore, we are again confronted with questions of statutory interpretation.

We begin our analysis with the term "major life activity." While the statute itself does not define a "major life activity," the ADA regulations adopt the definition found in the Rehabilitation Act regulations, 34 C.F.R. § 104. *Bolton*, 36 F.3d at 942. As defined, a "major life activity" includes, but is not limited to, "functions such as caring

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[4] It could be argued that by definition uncorrected vision of 20/200 and 20/400 makes worse or diminishes in a material respect the eyes on any individual creating a per se impairment. However, we do not espouse or endorse any per se impairments or disabilities. As noted supra, the ADA's use of individualized language requires courts to make case-by-case impairment and disability determinations. *See Runnebaum*, 123 F.3d at 169 (determination of whether individual with asymptomatic HIV is impaired or disabled must be made on individualized case-by-case basis).

for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). *See MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir.1996) (adopting regulation's definition of "major life activities") (*quoting* 29 C.F.R. § 1630.2(i)); *Lowe*, 87 F.3d at 1173 (including sitting, standing, lifting and reaching from 29 C.F.R. § 1630, App. § 1630.2(i)).

In their Amended Complaint, Plaintiffs alleged they are substantially limited in the major life activity of seeing. Inasmuch as seeing is expressly included in the EEOC's definition of major life activities, which has been previously adopted by this court, we do not decide what other activities may qualify and we now turn to consider whether Plaintiffs' physical impairment "substantially limits" their major life activity of seeing.

Pursuant to the ADA regulations, in order for a physical or mental impairment to be "substantially limiting," the individual must be:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

In determining whether an individual is substantially limited in a major life activity, the following three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2). *See MacDonald*, 94 F.3d at 1444 (*quoting* 29 C.F.R. § 1630.2(j)(2)); *Lowe*, 87 F.3d at 1173 (same); *Bolton*, 36 F.3d at 943 (same).

Thus, in order to establish that they are substantially limited in the major life activity of seeing, Plaintiffs must establish that they are unable to see or are significantly restricted as to the condition, manner, or duration of their ability to see as compared to the average person in the general population, taking into consideration the three listed factors. *See* 29 C.F.R. § 1630.2(j)(1)(i) and (ii). Plaintiffs have made no allegations that they are blind or unable to see.[5] Hence, we are concerned with Plaintiffs' vision as compared to the vision of the average person in the general population.

There is no dispute that Plaintiffs' vision impairment is permanent and results in the reliance on corrective measures, eye glasses or contact lenses, in order to carry

[5] Plaintiffs point out in their Amended Complaint that "corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification." However, this standard applies to corrected vision not uncorrected vision. Plaintiffs' corrected visual acuity is acknowledged to be "20/20 or better." Hence, any implication that they are "legally blind" is without merit.

out normal daily activities.[6] However, Plaintiffs argue that we must evaluate their vision impairment without respect to these mitigating measures. Plaintiffs rely on the EEOC's Interpretive Guidance for § 1630.2(j), which provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630, App. § 1630.2(j)(2) para. 8. Accordingly, Plaintiffs argue that they are disabled because their uncorrected vision substantially limits their major life activity of seeing.

United responds that the EEOC's Interpretive Guidance is in direct conflict with the statutory language requiring that the physical or mental impairment "substantially limit" a major life activity. United argues that to evaluate whether an individual has an impairment without regard to mitigating or corrective measures effectively reads out the statutory requirement that the impairment be "substantially" limiting. United reasons that the determination of whether Plaintiffs are "disabled" must be made taking into consideration any mitigating or corrective measures utilized by Plaintiffs.

Therefore, the crucial determination becomes whether the EEOC's Interpretive Guidance is correct that disability inquiries should be made without regard to

[6] On appeal, we do not consider the effects, if any, that eye surgery, such as radial keratotomy, may have on the permanency or long term impact of Plaintiffs' vision. However, we are mindful that as technology advances so must our consideration of these questions.

mitigating or corrective measures or is in conflict with the statutory mandate that the impairment "substantially limit" a major life activity. The courts that have considered this issue are split. While some courts have expressly or implicitly followed the EEOC's guidance,[7] others have expressly or implicitly rejected the EEOC's guidance as being in direct conflict with the statutory language requiring a "substantial" limitation.[8]

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[7] *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir.1997) (stating "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures"); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir.1996) (holding EEOC's interpretation is consistent with the ADA's legislative history, thus, an individual's disability must be assessed without regard to mitigating measures); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir.1996) (stating determination made without regard to mitigating measures without discussion or application), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1349, 137 L.Ed.2d 506 (1997); *Fallacaro v. Richardson*, 965 F.Supp. 87, 93 (D.D.C.1997) ("This Court finds that the EEOC's 'no mitigating measures' interpretation is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act, and supported by the legislative history of the ADA."); *Wilson v. Pennsylvania State Police Dep't*, 964 F.Supp. 898, 902-907 (E.D.Pa.1997) (expressly adopting EEOC guidance); *Sarsycki v. United Parcel Serv.*, 862 F.Supp. 336, 340 (W.D.Okla.1994) (relying on EEOC interpretation as authoritative without discussion).

[8] *See Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir.1997) (holding EEOC's interpretive guidance in conflict with statutory language and disability determinations should be made taking into consideration any mitigating measures) (2-1 decision); *Cline v. Fort Howard Corp.*, 963 F.Supp. 1075, 1081 n. 6 (E.D.Okla.1997) (recognizing split of authority and determining that "the better reasoned approach in the context of vision is one which evaluates the limitation with regard to the use and

We join those courts which have rejected this portion of § 1630.2(j) of the EEOC's Interpretive Guidance. We

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effectiveness of corrective devises"); *Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D.Kan.1997) ("EEOC Interpretive Guideline § 1630.2(j)'s pre-medicated perspective is in direct conflict with the ADA's express statutory language. . . . "); *Moore v. City of Overland Park*, 950 F.Supp. 1081, 1088 (D.Kan.1996) (same); *Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 881 (D.Kan.1996) (rejecting "without" portion of § 1630.2(j) because "plain language of the ADA conflicts with the EEOC's Interpretive Guidance"); *Schluter v. Industrial Coils, Inc.*, 928 F.Supp. 1437, 1445 (W.D.Wis.1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); *Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 813 (N.D.Texas 1994) (concluding "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation"); *See also Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-192 n. 3 (5th Cir.1996) (noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity"); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.1993) ("[A] person is not handicapped if his vision can be corrected to 20/200."), *cert. denied*, 511 U.S. 1011, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994); *Sweet v. Electronic Data Sys., Inc.*, No. 95-Civ.-3987, 1996 WL 204471, at *5 (S.D.N.Y.1996) (visual impairment of 20/20 in one eye and correctable to 20/80 in other eye does not qualify as a "disability" because it does not substantially limit ability to participate in any major life activity); *Deckert v. City of Ulysses*, No. 93-1295, 1995 WL 580074 (D.Kan. Sept. 6, 1995) (rejecting EEOC interpretation), *aff'd on other grounds*, 105 F.3d 669 (Table) (10th Cir.1996).

hold that this portion of the EEOC's Interpretive Guidance is in direct conflict with the plain language of the ADA. The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual. In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

This portion of the EEOC's Interpretive Guidance is not only in direct conflict with the statute, but is also internally inconsistent with other portions. In discussing "substantially limit" generally, the Interpretive Guidance states:

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. . . .
>
> The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630, App. § 1630.2(j) para. 1-2 (emphasis added). Thus, the EEOC recognized it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA.

Furthermore, in discussing whether an individual is disabled under the "regarded as" prong of the ADA, 42 U.S.C. § 12102(2)(C), because the employer "regards" the individual as having a substantially limiting impairment when in fact the individual's impairment is not substantially limiting, the Interpretive Guidance uses the example of "an employee [who] has controlled high blood pressure that is not substantially limiting." *Id.* at § 1630.2(l) para. 6 (emphasis added). Under this example, the employee is not actually disabled because in the controlled state the impairment does not "substantially limit" a major life activity. The employee's controlled high blood pressure does not affect, in fact, the ability to perform a major life activity.

Accordingly, to state a prima facie case and survive United's motion to dismiss, Plaintiffs' vision in its corrected state must "substantially limit" their major life activity of seeing. Plaintiffs cannot make this showing. It is undisputed that Plaintiffs' corrected vision is "20/20 or better." Thus, while Plaintiffs' uncorrected vision would undoubtedly "substantially limit" their major life activity of seeing, this is a hypothetical situation. In fact, Plaintiffs do not limit their normal daily activities to those that could be performed with their uncorrected vision. Plaintiffs admit that with their corrective measures they "function identically to individuals without a similar impairment." Plaintiffs merely don their eye glasses (or

contact lenses) and go about all their normal daily activities in the same or similar condition, manner, or duration as the average person in the general population. Hence, Plaintiffs can prove no set of facts upon which relief may be granted on this claim.

Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major live activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing. *See Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 878 (D.Kan.1996) (defendant "is trying to have it both ways" by claiming he is disabled due to high blood pressure, but that it is controlled sufficiently that he can perform the job).

II. 42 U.S.C. § 12102(2)(C) – Regarded As Disabled

Subparagraph (C) defines a "disability," as "being regarded as having" a physical or mental impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2)(C). The regulations provide three ways an individual is "regarded as" being disabled: (1) the individual: "[h]as a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation;" (2) the individual "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;" or (3) the individual "[h]as none of the impairments defined in [29 C.F.R. § 1630.2(h)(1) and (2)]

but is treated . . . as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(1)-(3). *See MacDonald*, 94 F.3d at 1444 (*quoting and adopting* 29 C.F.R. § 1630.2(l)). "Thus, '[a] person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment,' " regardless of whether the individual actually has an impairment. *MacDonald*, 94 F.3d at 1444 (*quoting Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir.1995) (citation omitted)). The focus is on the impairment's or the perceived impairment's effect upon the attitudes of others. *Id. See Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 913 (11th Cir.1996).

In this case, Plaintiffs contend United "regards" them as disabled in the major life activity of working.[9] Plaintiffs assert that United perceives them as unfit to work as global airline pilots because: (a) United's policy is not limited to certain pilot positions, aircraft, or routes but encompasses all pilot positions; (b) United presumed

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[9] In their Opening Brief, Plaintiffs assert that "United regards [them] as substantially impaired in the major life activity of seeing, working, or both." (Plaintiffs-Appellants' Opening Brief at 15). However, in their Amended Complaint, Plaintiffs' claim is limited to whether United regards them as substantially limited in the major life activity of working. (Plaintiffs-Appellants' Appendix at 9-10). In reviewing the grant of a motion to dismiss, we are concerned only as to whether Plaintiffs' complaint states a claim upon which relief may be granted. *Yoder*, 104 F.3d at 1224. Therefore, we consider only the claim found in Plaintiffs' Amended Complaint, i.e., whether United regards Plaintiffs as substantially limited in the major life activity of working.

without substantiation that they cannot perform the functions of the job; and (c) United disqualified them based on "myth, fear or stereotype" that individuals with uncorrected vision of worse than 20/100 constitute a safety hazard. In addition, Plaintiffs argue that other global airlines have similar or higher uncorrected vision standards than United, thus blocking Plaintiffs from seeking the same class of employment elsewhere in the industry.

United responds that it did not regard them as disabled. United argues that it did not regard Plaintiffs as substantially limited in the major life activity of working because its requirement did not preclude Plaintiffs from a "class of job." United contends that Plaintiffs merely "fail[ed] to meet the rational job-related safety requirements of the positions they s[ought]."

An employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that individual is incapable of performing a particular job. The statutory requirement that the employer regard the employee as having a substantially limiting impairment indicates that the employer regards an employee as substantially limited in the ability to work when the employer regards the employee's impairment or perceived impairment as foreclosing generally the type of employment involved. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir.1997). *See Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 354 (5th Cir.1997) ("An impairment must substantially limit employment in general, not merely the particular job that the plaintiff may wish to hold.").

In order "[t]o demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show 'significant[ ] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' " *Bolton*, 36 F.3d at 942 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i)). *See MacDonald*, 94 F.3d at 1444 (*quoting Bolton*). A "class of jobs" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). *See Siemon*, 117 F.3d at 1176 (*quoting* 29 C.F.R. § 1630.2(j)(3)(ii)(B)); *MacDonald*, 94 F.3d at 1444-45 (same). A "broad range of jobs in various classes" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(ii)(C). *See Siemon*, 117 F.3d at 1176 (*quoting* 29 C.F.R. § 1630.2(j)(3)(ii)(C)); *MacDonald*, 94 F.3d at 1445 (same). However, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). *See Siemon*, 117 F.3d at 1176 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i)); *MacDonald*, 94 F.3d at 1445 ("If neither of these definitions is met, and an individual instead shows only that he is unable 'to perform a single, particular job,' . . . the regulations and case

law make clear that he has not shown that he is 'substantial[ly] limit[ed] in the major life activity of working.' "); *Wooten*, 58 F.3d at 386 (holding that under the ADA, " 'working' does not mean working at a particular job of that person's choice"); *Bolton*, 36 F.3d at 942 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i)); *Welsh*, 977 F.2d at 1419 (holding that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act").

Therefore, in order to establish a disability under the "regarded as" prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes. In this case, we are concerned with whether Plaintiffs can present any set of facts based on their Amended Complaint establishing that United treated Plaintiffs as having a substantially limiting impairment. To do so, Plaintiffs must establish United's disqualification of them from all pilot positions as a significant restriction on their ability to perform a class of jobs.[10] *See Foreman*, 117 F.3d at 806 ("the question is whether Foreman was treated by [defendants] as having an impairment that substantially limits a major life activity"); *MacDonald*, 94 F.3d at 1445 (concluding that to establish a disability plaintiff must show defendant

[10] At oral argument, United stated that Plaintiffs were not disqualified from its non-passenger pilot positions. However, for the purposes of this appeal, we will assume Plaintiffs were disqualified from "all pilot positions" as they alleged in their Amended Complaint.

regarded him as being substantially limited in performing a class of jobs). We hold that Plaintiffs cannot make this showing. Taking all Plaintiffs' allegations as true, Plaintiffs can establish only that their physical impairment, their uncorrected vision, prevents them from working for United as a pilot; a single, particular job. They cannot show disqualification from a "class of jobs."

We are concerned with whether United regards Plaintiffs as "disabled," not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as "substantially limited" in a major life activity. It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters. *See Cook*, 10 F.3d at 25-26 (using example demonstrating focus is on employer in question not other employers in the industry). However, we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a "class of jobs."

The "class of jobs" Plaintiffs argue United disqualifies them from is that of "global airline pilot." However, this description is too narrow to constitute "class of jobs." A "class of jobs" consists of jobs that utilize "similar training, knowledge, skills or abilities." 29 C.F.R. § 1630, App. § 1630.2(j)(3)(ii)(B). As Plaintiffs' point out in their Amended Complaint, "[t]here is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines." (Plaintiffs-Appellants' Appendix at 10, ¶ 38(g)). Thus, the "class of jobs" to which Plaintiffs must compare themselves is that of all pilot positions at all airlines, because they all require the same or similar training, knowledge, skills, or

abilities. This class would include, but not be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines. *See e.g. McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir.1997) (class of jobs at issue included all manufacturing jobs not only narrow range of assembly line manufacturing jobs requiring repetitive motion or frequent lifting of more than ten pounds); *MacDonald*, 94 F.3d at 1445 ("[T]axiing aircraft is neither 'a class of jobs,' nor 'a broad range of jobs in various classes,' but is instead 'a single, particular job.'"); *Wooten*, 58 F.3d at 386 (concluding plaintiffs' carpal tunnel syndrome "prevent[ed] him from performing a narrow range of meatpacking jobs"); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir.1995) (arm impairment did not prevent plaintiff from working in entire class of welding jobs, only those requiring substantial climbing); *Welsh*, 977 F.2d at 1419 ("an impairment that an employer perceives as limiting an individual's ability to perform only one job [firefighter] is not a handicap").

For example, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. § 1630, App. § 1630.2(j) para. 15. With this example, the EEOC illustrates an individual who is "not substantially limited in the ability to perform any other major life activity and, with regard to working, [is] only unable to perform either a particular specialized job or a narrow range of jobs." *Id. See Bolton*, 36 F.3d at 942 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i) and *Welsh*); *Welsh*, 977 F.2d at 1419

(inability "to perform only one job is not a handicap under the [Rehabilitation] Act"); *Daley*, 892 F.2d at 215 ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."); *Forrisi*, 794 F.2d at 934 ("an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job"); *Tudyman*, 608 F.Supp. at 746 (concluding "refusal to hire someone for a single job does not in and of itself constitute perceiving the [person] as a handicapped individual").

Adopting Plaintiffs' reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a "disabled" individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working. *Forrisi*, 794 F.2d at 935. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir.1996) (stating that "otherwise . . . anyone[ ] could establish a prima facie discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in [a protected] group"). This reading would stand the Act on its head. This provision of the ADA seeks to remedy perceived disabilities that, like actual disabilities, extend beyond the isolated mismatch of employer and employee. We agree with the court's sentiments expressed in Hileman, "[w]e refuse to construe the . . . Act as a handout to those who are in fact capable of working in substantially similar jobs. . . . " *Hileman*, 115 F.3d at 354 (discussing Rehabilitation Act).

Finally, we note that while the FAA may not believe there is a safety concern regarding pilots with uncorrected vision of 20/100 or worse, that alone does not prevent United from presenting evidence to the contrary, were it necessary to refute a prima facie case of discrimination. As long as United does not practice illegal discrimination, we discern no reason why United cannot maintain a higher standard for safety than the FAA. It must be remembered that the FAA sets the minimum criteria for a pilot's license, not the maximum.

Conclusion

We hold that Plaintiffs' Amended Complaint alleged sufficient facts to support a conclusion that their uncorrected vision constituted a physical impairment under the ADA. However, for the foregoing reasons, we hold that Plaintiffs cannot present any set of facts showing their vision, when viewed with mitigating and corrective measures, substantially limits the major life activity of seeing. Nor can Plaintiffs show United regarded them as substantially limited in a major life activity of working by finding Plaintiffs unfit for its commercial pilot positions. Therefore, we affirm the district court's dismissal of Plaintiffs' ADA claims for failure to state a claim upon which relief may be granted.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN SUTTON and KIMBERLY HINTON,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 96-1481
UNITED AIRLINES, INC.,	)	D.C. No. 96-S-121
Defendant-Appellee.	)	

JUDGMENT

Filed November 26, 1997

Before **BRORBY, BARRET** [sic], and **McKAY,** Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ Randy Simmons
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN SUTTON and KIMBERLY HINTON,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.,
Defendant-Appellee.

No. 96-1481

ORDER

Filed March 3, 1998

Before **BRORBY, BARRETT,** and **McKAY,** Circuit Judges.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Randy Simmons
Deputy Clerk